Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-542

JOHN DAVID HAY

Petitioner

--v.--

STATE OF TEXAS
(Board of Pardons and Parole)

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES. COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 21, 1979

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Respondent

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TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The petitioner John David Hay, respectifully prays that a Writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 29, 1979.

Opinion Below

The opinion of the United States Court of Appeals appears in the Appendix hereto and is not yet reported.

The opinion of the United States District Court appears in the Appendix hereto and is not yet reported.

The opinion of the Court of Criminal Appeals for the State of Texas appears in the Appendix hereto and is not yet reported.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 29, 1979. This petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

Question Presented

Whether or not a "Not Guilty" verdict form, presented and signed by the duly elected Foreman of the Jury, to a presiding trial judge constitutes attachment of jeopardy?

Constitutional Amendments
Involved

U. S. Constitution, Fifth amendment -- in part: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

On January 30, 1978, an application for writ of Habeas Corpus was filed in the United States District Court for the Southern District of Texas. See: Hay v. Texas, 472 S.W.2d 157.(10/6/71)

This application was denied on May 23, 1978, without a hearing.

On May 23, 1978, Notice of Appeal was filed in the United States District Court for the Southern District of Texas.

On June 29, 1978 a certificate of probable cause was issued, and on July 31, 1978 all original papers in this matter were transferred to the United States Court of Appeals for the Fifth Circuit, New Orleans, La.

On June 29, 1979 the United States Court of Appeals for the Fifth Circuit affirmed the lower court's ruling.

REASON FOR GRANTING THE WRIT

1.

The Fifth Amendment to the United States Constitution provides, in part:

> "Nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb, nor shall he be a witness against himself, or be deprived of life, liberty or property without due process of law ---".

The petitioner in this instance case has been tried three (3) times, twice before a jury upon a plea of "not guilty" and once before the Court on a plea of "guilty".

At petitioner's initial trial in this cause, there were two (2) verdicts rendered,

the first being that of "not guilty", and the second, after instructions from the trial court, of "Guilty". The events surrounding the first verdict of "Not Guilty" have been the basis for the various appeals and Writ applications in this cause.

A review of these events can be found in the Original Trial Transcript, but for briefing they are as follows:

After instruction from the Court, the jury retired to consider the verdict. After deliberations, the jury returned to the courtroom. The court asked the jury if they had reached a verdict and the foreman of the jury stood and replied that they had, and handed the baliff the verdict form, whereupon the baliff handed the verdict form to the Court. At this point the Court stated, "Mr. Foreman, you have forgotten to sign the verdict form. Mr. Baliff, hand the charge to the foreman and let him sign it, (the charge was handed to the foreman of the jury and he signed the verdict). The foreman handed the verdict form to the baliff, and the baliff returned it to the Court. There was nothing said during this time to <u>anyone</u> in the courtroom.

The Court, after receiving the signed verdict form, stated: "Mr. Foreman, I believe you have done this wrong. Ladies and Gentlemen, go back to the jury room and consider your verdict and when you have done so, knock on the door and we will receive it".

After the jury had gone back to the jury room, petitioner's lawyer and the assistant district attorney representing the State of Texas approached the bench to determine what had happened.

Upon finding out that the Court had refused to accept the "Not Guilty" verdict, and had instructed the jury to go back into the jury room to reconsider their verdict, there ensued quite a heated argument for some few minutes. Thereafter the jury knocked on the door and was brought back into the courtroom. Again the foreman was asked if they had arrived at a verdict, and the foreman stated that they had and handed the verdict form to the baliff, who handed it to the Court, whereupon the Court read aloud the following:

> "---We the jury, find the defendant guilty of robbery by assault, as charged in the indictment, signed by the foreman. So say y'all ladies and gentlemen?" (whereupon the jury answered in the affirmative, that it is their verdict). See verdict form where original signature of the foreman of the jury on the "Not Guilty" line is scratched through, and has been signed on the "Guilty" line".

At this point, the Court, in a statement, into the record, tried to clean up his mistake. Also the jury was polled for the first time. Defendant's lawyer also asked for a mistrial at this time, but it was not granted.

The petitioner contends the following:

A. No person, for the same offense, shall be twice put in jeopardy --- (See U. S. Constitution Fifth Amendment; Texas Constitution Article 1 § 14, United States v. Jorn, 400 US 516. The cases are clear, that retrial may be had in cases where a mistrial was requested by defendant and granted by the court or where a conviction is reversed on defendants motion UNLESS

such action is provoked by improper acts of the court or prosecution. (See Bryan v. U. S., 338 US 552, and Foreman v. U.S., 361 US 416.

By no stretch of the imagination or judicial rhetoric can the first verdict of "Not Guilty" handed to the court in this case at bar, be considered informal, illegal, or improper form. In stating, "I believe you have done this wrong" the court in effect told the jury it should have returned a "Guilty" verdict, rather than a not guilty verdict. If this is not construed as coercion, then the word coercion has no meaning in judicial review. (See: Jenkins v. U.S. 85 S. Ct. 1059). A judgment of acquittal, whether it results from a jury verdict ordered by the court, or the jury's decision based on the merits of the case, bars further proceedings against the defendant as provided by the double jeopardy clause of the fifth Amendment, for the same offense (See Fong Foo v. U.S. 82 S. Ct. 671). To tell a jury that they have reached a "wrong" verdict, when there are only two possible verdicts on the verdict form is tantamount to an instructed verdict of guilty, and since the jury was instructed that their verdict was wrong, what other choice did they have but to return the second verdict of guilty, and subsequently to testify to that fact, when polled after the second verdict was read aloud in open court.

There should never have been an "Appeal to the Texas Court of Criminal Appeals in this instance case, nor any subsequent Habeas Corpus hearings. As this court stated in Downum, V. U.S., 372 US 734-738, any doubt should be resolved in favor of the liberty of the citizen, rather than exercising what would be an unlimited, uncertain and arbitrary Judicial discretion.

This petitioner has not only been "twice" put in jeopardy in this cause, but also meets the requisite of the Fifth Amendment to the U. S. Constitution as to having his constitutional rights that are guaranteed each and every citizen of the U. S. flagrantly violated. He has been compelled to be a witness against himself (ie: try spending over 5 years in a county jail and then being told "if you plead guilty, you will be allowed to go to the penitentiary where you will be eligible for parole).

Petitioner has been deprived of liberty (ie. sent to prison) and deprived of property (ie. all petitioner's money went to lawyers, except for this writ (he has no money left to hire an attorney to file this application). Petitioner can be thankful that he has not been deprived of his life, although being in jail and prison with hardcore criminal elements is tantamount to taking one's life into one's own hands.

Although the Fifth Circuit's affirmation of this cause is without written opinion, petitioner was present at oral arguments on June 18, 1979. Since one of the Circuit Judges referred to Jones v. Estelle, 538 F 2d 651 (1976), it is obvious this is the basis of their affirmation. Petitioner will readily agree that the trial judge in that cause was solely directed at dispelling confusion in the verdict returned and did not show any inquiry that could be taken to constitute coercion of the jury's verdict. This petitioner believes the above case differs from his in that the record clearly shows the trial judges statements, in petitioner's case, constituted coercion of the jury's verdict. (See U.S. v. Edwards, 469 F 2d 1362 and U.S. v. Sexton, 456 F 2d 961).

This petitioner has searched for 10 years to try and find a similar case as his, but to no avail. There is no case which this petitioner can find where a criminal trial judge refused to accept a "Not Guilty" verdict from the jury, and sent them back to the jury-room to reconsider their verdict. There has never been a fact finding hearing on this matter that was conducted by anyone except the original trial judge, but even these records reflect that the Original trial Judge did not know why he thought the "not guilty" verdict was the "wrong" verdict. He just states that he felt that the jury foreman signed on the wrong form inadvertantly. He never had a conversation with the foreman of the jury, nor did he poll the jury until they had returned with the "Second" verdict, that one being guilty.

Petitioner would like to express to this court his apology for the form of this writ application. He is not schooled in law, and his limited knowledge of the law comes from working on this case for 10 years. Petitioner also feels that this court should send this cause back to District Court for a full evidentiary hearing, so that all the facts and events surrounding the "First Verdict" in this case be brought out. In the alternative, petitioner would ask this Court to have sent to it the <u>complete records</u>, of this case. The Fifth Circuit Court of Appeals has sent them back to District Court Judge Singleton for the Southern District of Texas.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the United States Court for the Fifth Circuit.

Respectfully submitted,

JOHN DAVID HAY

8401 Westheimer
Suite 174
Houston, Texas 77063

(713) 784-0220

Petitioner Pro Se

September 21, 1979

APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-3543

JOHN DAVID HAY

Petitioner-Appellant.

versus

STATE OF TEXAS (BOARD
OF PARDONS AND PAROLE).

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(JUNE 29, 1979)

Before: GOLDBERG, FAY AND RUBIN, Circuit Judges

PER CURIAM: Affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN DAVID HAY, Petitioner STATE OF TEXAS (BOARD OF PARDONS AND PAROLE), Respondent	CIVIL ACTION H-78-526

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this court that this action should be and is hereby DISMISSED.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 23rd day of May 1978.

Judge John V. Singleton
UNITED STATES DISTRICT JUDGE

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas ..... OCT 6 1976 .....

Dear Sir:

This is to advise that the Court has denied without written order the application for writ of habeas corpus
.....
.....
in Application No. ..3645....., John David Hay .....

Sincerely yours,

GLENN HAYNES, Clerk

Constitutional Amendments Involved

U. S. Constitution, Fifth Amendment -- in part: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property without due process of Law.

Texas Constitution, Article 1 § 14--- in part:
"No person, for the same offense shall be twice put in jeopardy for life or liberty, nor shall a person be again put on trial for the same offense after a verdict of not guilty in a court of competant jurisdictions".

If you find the defendant guilty, use this form of verdict:)

We, the Jury, find the defendant guilty of Robbery by Assault as charged in the Indictment.

FOREMAN.

If you find the defendant not guilty, use this form of verdict:)

We, the Jury, find the defendant not guilty.

FOREMAN.

Certificate of Service

I, John David Hay, petitioner Pro Se, do hereby certify that three true copies of the above and foregoing application for writ of Certiorari have been deposited in the United States mail, postage prepaid. Certified on this the 25 Day of September, 1979 to the following address:

MR. MARK WHITE
Attorney General of Texas

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Att'n: Gilbert J. Pena
Assistant Attorney General
Respondent

John David Hay
Petitioner Pro Se